

CHUNG KHIAW BANK (MALAYSIA) BHD

a

v.

TIO CHEE HING

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

AHMAD FAIRUZ JCA

HAIDAR MOHD NOOR JCA

[CIVIL APPEAL NO: S-02-709-1996]

9 APRIL 2004

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**CIVIL PROCEDURE:** Striking out - Grounds for - Abuse of process of court - Res judicata - Application by defendant to strike out plaintiff's originating summons - Whether plaintiff's pleaded case in previous suit essentially the same as in present action - Whether judge had carried out careful and searching inquiry into history of litigation between plaintiff and defendant - Whether relevant considerations taken into account - Whether there was exercise of the judicial mind - Whether plaintiff's originating summons an abuse of process of court - Interest reipublicae ut sit finis litium

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**CIVIL PROCEDURE:** Action - Abuse of process - Application by defendant to strike out plaintiff's originating summons - Whether plaintiff's pleaded case in previous suit essentially the same as in present action - Whether judge had carried out careful and searching inquiry into history of litigation between plaintiff and defendant - Whether relevant considerations taken into account - Whether there was exercise of the judicial mind - Whether plaintiff's originating summons an abuse of process of court - Interest reipublicae ut sit finis litium

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The plaintiff (chargor) took out an originating summons against the defendant (chargee/bank) claiming that the defendant had – after having taken a charge over a plot of the plaintiff's land – reneged on its agreement to provide the plaintiff with an overdraft facility of RM1.4 million. A declaration was sought, *inter alia*, that the charge had become inoperative and null and void. Thereafter, the defendant applied to have the plaintiff's originating summons struck out under O. 18 r. 19 Rules of the High Court 1980 ('RHC') on the grounds of 'res judicata' and 'abuse of process of court'. The learned judge refused the defendant's application and it appealed to the Court of Appeal.

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**a Held (allowing the defendant's appeal)****Per Gopal Sri Ram JCA delivering the judgment of the court:**

- b** [1] The plaintiff had previously brought a claim based on fraud ('Suit No: S-117/1982') against the defendant. That claim had eventually been struck out by the Supreme Court (*Chung Khiaw Bank Ltd v. Tio Chee Hing* [1987] CLJ 81 (Rep)). A comparison between the plaintiff's pleaded case in Suit No: S-117/1982 and that in the present originating summons would reveal that they were both in essence the same. Indeed, the plaintiff was attempting to avoid his liabilities under the charge on the ground that he never received the funds promised by the defendant. Hence, the conclusion of the learned judge herein that the originating summons was not fit for summary disposal was one that was 'unreasoned'. The learned judge had not carried out a careful and searching inquiry into the long history of litigation that had taken place between the plaintiff and the defendant. Relevant considerations were not taken into account and there was simply
- c** no exercise of the judicial mind. The plaintiff's originating summons was indubitably an abuse of the process of the court. *Interest reipublicae ut sit finis litium*. (p 66 a-g)
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[Orders of learned judge set aside; order in terms of defendant's summons-in-chambers.]

**e****[Bahasa Malaysia Translation Of Headnotes]**

- f** Plaintiff (penggadai) telah mendaftarkan satu saman pemula terhadap defendan (penerima gadaian/bank) menuntut bahawa defendan – selepas menerima gadaian ke atas sebidang tanah plaintiff – telah memungkiri janji untuk memberi kemudahan overdraf sebanyak RM1.4 juta kepada plaintiff. Suatu perisytiharan telah dipohon bahawa gadaian telah menjadi tidak beroperasi serta batal dan tak sah. Berikutnya, defendan memohon untuk mengetepikan sama pemula plaintiff di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan '*res judicata*' dan '*salah guna proses mahkamah*'. Yang arif hakim
- g** menolak permohonan defendan dan defendan merayu ke Mahkamah Rayuan.

**Diputuskan (membenarkan rayuan defendan)****Oleh Gopal Sri Ram menyampaikan penghakiman mahkamah:**

- h** [1] Plaintiff sebelum ini telah membawa tindakan berasaskan fraud ('Guaman No: S-117/1982') terhadap defendan. Tuntutan tersebut telah akhirnya ditolak oleh Mahkamah Agong (*Chung Khiaw Bank Ltd lwn. Tio Chee Hing* [1987] CLJ 81 (Rep)). Membanding kes yang dihidang plaintiff di dalam Guaman No: S-117/1982 dengan saman pemula semasa menunjukkan bahawa kedua-duanya adalah pada hakikatnya sama. Malah, plaintiff cuba
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mengelak dari liabilitinya di bawah gadaian atas alasan bahawa beliau tidak menerima dana yang dijanjikan defendan. Oleh itu, dapatan yang arif hakim di sini bahawa saman pemula adalah tidak sesuai untuk diputuskan secara terus adalah sesuatu yang ‘tidak beralasan’. Yang arif hakim tidak membuat kajiselidik yang rapi dan berhati-hati terhadap sejarah litigasi yang panjang yang wujud di antara plaintif dan defendan. Pertimbangan-pertimbangan yang relevan telah tidak diambil kira manakala pertimbangan kehakiman langsung tidak dibuat. Saman pemula plaintif sangat jelas merupakan suatu penyalahgunaan proses mahkamah. *Interest reipublicae ut sit finis litium.*

*Perintah-perintah yang arif hakim diketepikan; saman-dalam-kamar defendan dibenarkan seperti yang dipohon.]*

**Case(s) referred to:**

*Chung Khiaw Bank Ltd v. Tio Chee Hing* [1987] 1 CLJ 531; [1987] CLJ (Rep) 81 (refd)

*Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1 (foll)

*Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 SC (foll)

*Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 (foll)

**Legislation referred to:**

Rules of the High Court 1980, O. 18 r. 19

*For the appellant/defendant - Alex Khoo (David Wong & Francis Wong); M/s Peter Lo & Co*

*For the respondent/plaintiff - Teh Boon Eng (Anuar Ghani Gilong); M/s Anuar Ghani & Assoc*

[Appeal from High Court, Kota Kinabalu; Originating Summons No: K2-1990]

*Reported by Gan Peng Chiang*

**JUDGMENT**

**Gopal Sri Ram JCA:**

This appeal is directed against the order of the High Court dismissing the appellant’s application to strike out the respondent’s originating summons.

Although this case has a very long history, the issue at stake in the present proceedings is a narrow one. The gist of the respondent’s complaint against the appellant is that it took a charge over his land promising to advance him a general overdraft facility of up to RM1.4 million but failed to do so. On that basis, the respondent claimed the following relief in his originating summons:

- a** (1) A declaration that upon the true construction of the Memorandum of Charge dated 9th August, 1965 (and registered as Memorial No. 92666 in the Central Land Registry, Sabah) and made between the Plaintiff as chargor of the one part and the Defendant as chargee of the other part:
- b** (a) the Defendant had covenanted to grant the Plaintiff general overdraft facilities up to a maximum amount of M\$1,400,000.00;
- (b) that the Plaintiff had executed the Charge in consideration of the agreement on the part of the Defendant to grant the Plaintiff the said overdraft facilities;
- c** (c) that the Memorandum of Charge as a Charge on the lands described in the said Memorandum of Charge is effective when the Defendant performs its obligation to grant the Plaintiff the said overdraft of M\$1,400,000.00.
- d** (2) A declaration that upon the true construction of the Charge registered as Memorial No. 92666 in the Central Land Registry, Sabah and in the events which have happened the Defendants have failed, refused and/or neglected to grant the Plaintiff; the overdraft facilities of M\$1,400,000.00, thereby resulting in a total failure of consideration.
- e** (3) A declaration that upon the true construction of the said Charge registered as Memorial No. 92666 in the Central Land Registry, Sabah, and in the events which have happened, the said Charge is null and void and inoperative
- f** (4) A declaration that the Plaintiff is entitled to the lands comprised in the said Charge registered as memorial 92666 discharged from all claims by the Defendant as Chargee thereof under the Memorandum of Charge.

**g** The appellant then applied to strike out the respondent's claim pursuant to RHC O. 18 r. 19. It relied on several grounds. These included a plea of *res judicata* and an assertion that the action constituted an abuse of the court's process. As a matter of law, the latter ground is much wider than the former. A party to any proceedings may be unable to establish the requirements of the doctrine of *res judicata*. Yet, he may succeed in demonstrating that the particular suit or other proceeding or a step taken in a proceeding is an abuse of process and successfully apply to have it struck out on that ground. This was made clear by the Supreme Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256. Abdoolcader SCJ who delivered the judgment of the court said:

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There is moreover the inherent jurisdiction of the court in cases where *res judicata* is not strictly established, and where estoppel *per rem judicatam* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any re-agitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v. Attorney-General for Queensland* [1979] AC 411, 425.

The second defence is one of “*res judicata*”. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. (p. 590).

The attempt by way of the instant proceedings to re-litigate and reopen the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police & Ors* [1982] AC 529, 542.

In *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1, Lord Bingham of Cornhill re-stated the doctrine of abuse of process as follows:

The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (*Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581 at 590, [1975] 2 WLR 690 at 696 per Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v. A-G for Queensland* [1978] 3 All ER 30 at 36, [1979] AC

- a** 411 at 425 per Lord Wilberforce, giving the advice of the Judicial Committee). **This does not, however, mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward.** For there is, as Lord Diplock said at the outset of his speech in *Hunter v. Chief Constable of West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536, an:
- b** inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a
- c** duty (I disavow the word discretion) to exercise this salutary power.
- d** One manifestation of this power was to be found in RSC Ord 18, r 19, which empowered the court, at any stage of the proceedings, to strike out any pleading which disclosed no reasonable cause of action or defence, or which was scandalous, frivolous or vexatious, or which was otherwise an abuse of the process of the court.
- e** Where an abuse of process is alleged in reliance upon or in relation to any previous litigation between the parties or their privies, it is the duty of the court to undertake a minute examination of the history of the prior litigation. To do this does not offend O. 18 r. 19 in this particular context. As Peh Swee
- f** Chin SCJ said in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, another abuse of process case:
- g** However, the learned judge in the court below, who is very experienced and very able, and who referred very much to the same issues, appears to be much exercised by the fact that the application was made under O. 18 r. 19, in reversing the learned registrar's decision, in holding, 'On the facts of this case I consider that O. 18 r. 19 is not appropriate to shut out the plaintiffs from pursuing their claims'.
- h** The cautionary words are words which have been frequently employed in connection with an application under O. 14. It was unfortunate that the case of *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1, a Privy Council case was not cited in the court below, though it was cited to us here.
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In *Tractors*, the defendants applied to set aside the pleadings there on the grounds that they were frivolous and vexatious. The High Court allowed the application holding that the action was bound to fail. The Federal Court, on appeal, regarded themselves as precluded from examining the evidence for determining whether the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. **The Privy Council went through the evidence with a fine-tooth comb and decided to agree with the learned judge at the first instance and restored the High Court's decision.** It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be. (emphasis added.)

The present case, as we have already said, has a long history. Part of that history includes an earlier action in which the respondent mounted a claim based on fraud against the appellant. It was titled as Suit No. S 117/1982. An application to strike out that action failed at first instance. But it succeeded on appeal. In the Supreme Court, Wan Suleiman SCJ examined the preceding history of the litigation between the parties. See, *Chung Khiaw Bank Ltd v. Tio Chee Hing* [1987] 1 CLJ 531; [1987] CLJ (Rep) 81. The relevant passage in the judgment of his Lordship reads as follows:

Appellants registered the first charge on August 14, 1968, (Memorial No. 92666) and the second charge on August 13, 1986. Tio complains that the appellants had fraudulently obtained the first charge. In paragraphs 9 and 10 of his statement of claim he set out the particulars of his charge of fraud alleging that the appellants had no intention of providing money under that charge, no account was opened for it and no money was paid under it. Appellants had, he added, consistently refused to provide evidence of money allegedly provided under the first charge, and had tricked him into executing the two charges and the appellants had made dishonest use of the first charge and purported to realise it even though no loan had been made under it.

His Lordship noted that paragraph 11 of the statement of claim alleged that appellants took unfair advantage of Tio's financial difficulties in executing the first and second charge and struck an unconscionable bargain.

His Lordship then concluded the opinion of the court in the following terms:

Having therefore given careful consideration to the whole history of this unfortunate affair we must, with respect, say that the learned Judge had erred in not holding that **this suit brought by the respondent Tio discloses no reasonable cause of action and is vexatious and an abuse of the process of the court.** (emphasis added.)

- a* A comparison of the respondent's pleaded case in Suit S 117/1982 and in the present action reveals that they are in essence the same. What the respondent is attempting to do in the present case is to avoid liability in respect of the charge dated 14 August 1968 registered under Memorial No. 92666 on the ground that he never received the funds promised by the appellant bank. If you read Wan Suleiman SCJ's judgment in *Chung Khiaw Bank Ltd v. Tio Chee Hing*, you will find that the respondent had by that time made several similar attempts in other proceedings.

- c* That brings us to the present appeal. In his judgment, the learned judge, after setting out the prayers in the originating summons and all the affidavits exchanged between the parties as well as the arguments advanced by counsel on either side came to the brief and un-reasoned conclusion that the case was not a fit one for summary disposal. His lordship did not carry out a careful and searching inquiry into the long history of litigation that had taken place between the parties over the very incumbrance that forms the subject matter of the present action. We must say, with great respect to the learned judge, that there was simply no exercise of the judicial mind to the facts and circumstances forming the background of this case.

- e* We readily accept that the decision of a primary judge to strike out or to permit an action to proceed is manifestly an exercise of discretion. But this is a case in which relevant considerations, in particular the history of the matter, was not taken into account. Accordingly, this court is entitled to intervene and exercise its own discretion.

- f* Having carefully read the voluminous material placed by the appellant before the learned judge, we are unable to find a clearer case of an abuse of the court's process. This is a case where previous attempts to impeach the charge which forms the subject matter of the present action have failed time and again. To no other case do we find the maxim: *Interest reipublicae ut sit finis litium* more appropriate than the present.

- g* For the reasons given, this appeal must succeed. It is allowed. The orders made by the learned judge are set aside. There shall be an order in terms of the appellant's summons in chambers dated 9 February 1990. The respondent must pay the appellant the costs of this appeal and of the proceedings in the court below.

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